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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 390

GULFPORT FARM AND PASTURE COMPANY, A CORPORATION

v.

HANCOCK BANK

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of the State of Mississippi, entered December 9th, 1957 and judgment over-ruling suggestion of Error entered February 24, 1958, and respectfully submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial Federal questions are presented.

OPINION BELOW

The opinion of the Supreme Court of the State of Mississippi is not yet reported in the official Mississippi State Reports as the volume in which this opinion will appear has not yet as of now been printed. This opinion is unofficially reported in Volume 98 Southern Reporter 2nd Series, pages 862 & 863. Copy of which opinion is attached as Appendix I

JURISDICTION

The proceedings were actions to "cancel cloud" on title to real property, consisting of approximately five thousand acres of land and were brought pursuant to the appropriate Mississippi Statutes, Section 1324 of the Code of 1942 Volume 2, Recompiled. Judgment was entered December 9th, 1957 and is strict compliance with all rules of the Supreme Court of Mississippi a suggestion of error was seasonably filed with supporting printed brief, which was overruled.

The order overruling the "Suggestion of Error" entered by the Supreme Court of Mississippi on Monday, February 24, 1958 as shown in Record on file herein on page 296. Notice of Appeal was filed on May 23, 1958 with the Supreme Court of the State of Mississippi, and an enlargement of time to file record and docket in the U. S. Supreme Court was granted by Associate Justice Gillespie until August 22, 1958, a copy of such order appears on file in this record, and a further enlargement of time to file record and docket by Associate Justice Gillespie on August 19th, 1958 until September 21, 1958, a copy of which order appears in this record.

Jurisdiction of this appeal is conferred upon the Supreme Court by Title 28, United States Code, Section 1257 (2). Cases sustaining the jurisdiction are as follows:

Atchison T. & S. F. Ry. Co. vs. Pub. U. Comm. (1953) 346 U. S. 346, 74 S. Ct. 92.

Standard Oil Co. of Cal. vs. Johnson (1942) 316 U. S. 481, 62 S. Ct. 1168. *Word vs. Kninley,* 1922, 42 S. Ct. 529, 259 U. S. 503, 66 L ed. 1033, 28 L. R. A. 1207.

STATUTES INVOLVED

The validity of the following state statutes is involved:

Section 718 of the Mississippi Code of 1942, as construed and interpreted by the decision of the Supreme Court.

Section 888 of the Mississippi Code of 1942 being a statute in effect at the time of the execution of the Deed of Trust and is now a statute in full force is being disregarded and thereby the contract is being changed by a court decision contrary to the 14th Amendment of the United States Constitution.

Section 711 of the Mississippi Code of 1942 which is commonly called "The 10-year Statute of Adverse Possession" although unmistakenly and specifically mentioned as applying in case of void foreclosure sale to the exclusion of all other statutes of limitations, was denied this function and application by the decision of the Supreme Court of Mississippi, and in this denial the common law of "Adverse Possession" is denied.

Section 1324 of the Mississippi Code of 1942.

Section 718 is made Appendix II.

Section 711 is made Appendix III.

Section 888 is made Appendix IV.

Section 1324 is made Appendix V.

QUESTIONS PRESENTED

Whether Section 718 of the Mississippi Code of 1942 on its face and as construed and applied is unconstitutional in violating the due process clause of the Fourteenth Amendment of the Constitution of the United States of America.

In infringing the rights under said Amendment 14 and in a subtle way to divest Appellant of a vested real property interest without due process of law.

(b) To infringe on the rights of Appellant in denying it equal protection under the law.

(c) To infringe on the rights of Appellant under Amendment (14) by the impairment of contract. In this instance the deed of trust is not followed and the law section 888 which by virtue of the law is a part of all deeds of trust is also crudely and callously disregarded even though the last sentence of said section 888 is merely following the common law.

(d) By construing and applying Sections 711, 778, 888 and 1324 Mississippi Code of 1942, so as to violate the constitution and laws of the United States.

STATEMENT

We emphatically and uncompromisingly have an unshakable belief in the truth.

This case was begun by a bill entitled "Bill to Cancel Cloud" under Section 1324, which section is entitled "Removing clouds upon Titles". The essential allegations are simple to wit: The foreclosure sale by a substituted trustee was void because of no authority to substitute a trustee, granted in the deed of trust, a certified copy of deed of trust was made in exhibit to answer, the original deed of trust was put in evidence by the defendant, and all were true copies and showed no power of substitution.

This case was commenced by bill of complaint filed by Gulfport Farm & Pasture Co., a Mississippi Corporation under Section 1324 Code of 1942 of the State of Mississippi, and the bill was entitled "Bill to Cancel

Cloud" the title to said Section 1324 being "Removing Clouds upon Titles". That various motions and demurrers and answers were filed and ruled on which for the purpose of this appeal are neither pertinent nor material with the following exceptions.

(1) Motion to set plea matter for separate hearing (R. P. 119-121).

(2) Order setting plea matter for separate hearing, showing "O. K." initialed by attorneys on both sides.

The remarks of one of the attorneys for defendant is pertinent here:

"Now in reply to that, we would like the record to show that first this plea is not a plea of adverse possession. Put that down. It is a plea of Statute of Limitations under Section 718 of the Code. Second: that the hearing on this plea of the statute of limitations was set to be heard today by agreement on the law and the facts as evidenced by an order of this court taken on October 22nd. That in pursuance of that order we have a large number of witnesses here ready to testify and we insist that we are entitled to a hearing in accordance with the order of the court and the agreement made by counsel.

BY THE COURT:

You may proceed in accordance with the order of October 22nd."

The Special Chancellor held that the

"Third Affirmative Defense—Statutes of Limitation —constitutes a complete defense to said original, amended and second amended bill of complaint and should be sustained".

There was no finding of specific facts and the very pertinent fact of the invalidity of the foreclosure sale by an unauthorized substituted trustee was not found by the trial court.

The Supreme Court of Mississippi in the written opinion did find that the sale by the unauthorized substituted trustee was invalid. No mention is made of Appellant's title as being void nor is there any denial of its validity and so for the purpose of this appeal, and in the present state of the record on appeal, the Appellant is clothed with the legal title, subject to Appellee's defense of a statute of limitation WITHOUT ADVERSE POSSESSION.

SUBSTANTIALITY OF THE FEDERAL QUESTION

The Federal questions are so substantial as to require plenary consideration, with briefs on the merits and oral argument for all too apparent is "the public importance of this type of legislation and the recurring serious constitutional questions which it presents."

If it was competent for the legislature to make a void proceeding valid, then it was done in this case. Upon this question we cannot for a moment doubt or hesitate. There can no more import a binding efficacy to a void proceeding than they can take one man's property from him and give it to another. Indeed to do one is to accomplish the other.

For authorities see: Cooley on Constitutional Limitations, marg. p. 371, marg. p. 383;

McDaniel vs. Correll, 19 Ill. 226.

Roche et al vs. Waters et al, 72 Md. 264.

Menges vs. Dautler, 33 Pa. pg. 405.

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Fuller vs. Hager, 470, 242 (83 Pae 782).

Maxwell vs. Goetschius, 11 Vroom 383, (29 Am. St. Rep. 242).

That the Federal questions, sought to be reviewed were raised, is clearly set out in the seggestion of Error filed in the Supreme Court of Mississippi, and this was the first time that the constitutional question arose for the reason that until there was a finding of fact towit: "the foreclosure sale under which appellee entered into possession was invalid (which was conceded)" was made we had no ground upon which to plead Section 888. If the Court had found that the said foreclosure sale was valid then we would not have had a leg to stand on.

(1) *Effect on Owners of Vested Property Rights*

Both the abridgment of their constitutional rights and the financial penalty imposed on it for claiming these rights have been particularly cruel in their effect on Appellant because of its present weakened financial position. The bank has its principal assets tied up and has compelled it to practically require charitable financial assistance to prosecute this cause.

If this decision is permitted to stand as not violative of the Constitution of the United States then the vested

property rights become a mere sham and the banks and other financial structures are weakened at the real source of their stability which is "order under law". And Shylock's whine: "Is that the law?" will unquestionably be repeated by this bank president if the true and real law is followed and enforced.

(b) To infringe on the rights of Appellant in denying it equal protection under the law.

Surely this is a principle and constitutional right which should be nobly and conscientiously adhered to and strictly followed.

A common law principle is that statutes of limitation are to be strictly construed against those asserting them. This principle has been completely disregarded by the courts to the damage and detriment of Appellant, thereby depriving it of the equal protection of the laws.

(c) To infringe on the rights of Appellant by "Impairment of contract".

This was accomplished by the court in refusing to read into the contract the laws governing the execution and enforcement thereof to-wit Section 888 Miss. Code of 1942, hereinabove set out in verbatum.

That Section 888 was applicable when the foreclosure sale was void. The lower court made no finding of fact on this pertinent question although it was obvious from the plain wording of the deed of trust document, which granted no power to substitute a trustee. So that in the lower court there was no constitutional question apparent. For the reason that if the sale was valid then Section 888 would not apply. However on appeal the Supreme Court of Mississippi found that the sale was invalid, in its opinion rendered December 9, 1956.

Thereupon Appellant secured an extension of time to 30 days and within said time filed its suggestion of Error and Brief, setting out therein at the first available instance the Constitutional question of infringing the rights of Appellant under the Fourteenth Amendment of the United States Constitution, which infringement was accomplished by the opinion and judgment of the Supreme Court of Mississippi, and was not present until said opinion and judgment was rendered. So as to timeliness the constitutional question could not have been raised sooner because it did not exist sooner.

If the Supreme Court had not found that the foreclosure sale was invalid, there would be no constitutional question.

2. *Effect on Principle of Common Law of Adverse Possession.*

Thompson on Real Property, Volume 5 (Essential elements of Adverse Possession).

All presumption are in favor of the holder of the legal title.

80, A L R, 151

97 A L R, 1

To the extent that the rule of transfer of title by adverse possession arises out of the common law theories of Deseisin, and NOT OUT OF STATUTES OF LIMITATIONS, reliance must be had on actual disseisin, i.e., an actual taking of possession by the adverse possessor before the period can be said to begin running. Essential elements of Adverse Possession.

The unfolding of the bud of possession into the flower of title comes so close to the concept of forfeiture

obtained by equity that the law has developed certain elements essential to such perfection of title. Generally speaking, since there are no equities in favor of a person seeking to acquire property of another by adverse holding, his acts are to be strictly construed (*Paul vs. Mead*, Pg. 1, 234 Iowa 11 NW (2nd) 706).

These elements become part of the common law doctrine of adverse possession even though under the rule of the particular state adverse possession is bottomed on a particular statute of limitations which is itself silent as to these requisites. IN NO STATE IS THE STATUTE OF LIMITATIONS SELF SUFFICIENT. ALWAYS IS IT SUPPLEMENTED BY THESE COMMON LAW RULES (*Kurz vs. Blanc* 407 I) 383 (95 NE (2nd) 338 25 A.L.R. (2nd) 1258; *Meyers vs. Canutt*, 242, Iowa 692, 46 N.W. (2nd) 72, 24 A.L.R. (2nd) 1. 39—A.L.R. (2nd) 1420.

A true owner has the constructive possession or seisin and his disseisin cannot be brought about without actual adverse possession, and if there is no diseisin the statute of limitation can have no operation.

Simmonds vs. Stonolind Oil & Gas Co. (Tex) 114 SW (2nd) 226. *Word vs. Box* 66 Tex 596. 3 SW—93, 98

For further authority on the pertinent legal question we cite the following:

> "*Constructive Possession*—To the extent that the rule of transfer of title by adverse possession arises out of the common law theories of disseisin, and not out of the statute of limitations, reliance must be had upon actual disseisin, i. e. an actual taking of possession by the adverse possessor before the period can be said to begin running 34"

See Ballentine, Titles by Adverse Possession 32 Harvard Law Rev. 135

Bordwell, Disseisin & Adverse Possession 33 Yale L. J. 1, 141, 285

"But there is, in truth, no such transfer of title by the Statute of Limitations.

Title is thus established by the joint operation of the statute and the common law—The possession of the adverse holder—is per se a good title.

Yale Law Journal, Nov. 1923.

Disseisin & Adverse Possession by Percy Bordwell.

It was held at an early period that title draws to itself possession or seizin unless the land is in the adverse possession of another.

Van Brunt vs. Schenck (1814 N. Y.) 11 Johns 377, 385; *Green vs. Liter* (1814 U. S.) 8 Cranoh 229, 249; *Hawk vs. Sensemah* (1820 Pa) 6 Serg & R. 21; *Jackson vs. Sellers* (1811) N. Y.) 8 Johns 202; *Jackson vs. Howe* (1817 N. Y.) 14 Johns 405; *Rust vs. Boston Mill Corporation* (1828 Mass.) 6 Pick 158, 170; Den ex dem. *Saxton vs. Hunt* (1845 N. Y. Sop. Ct) Spencer 487, 491; *Cresap's Lessee v. Hutson* (1850 Ma.) 9 Gill 269, 276; HiB & JiW. Wallace's Note in 2 Smith Lead cas. (5th Am Ed 1866) 501; 1 Scribner-Dowey (2nd Ed. 1883 254; Freeman, 85 Am. Dec. 322 note; Ames Lectures on legal History (1913) 229.

CONCLUSION

We believe that the questions here presented are of such public importance and substance, and the abridgements complained of are so severe and in such a vital

area that they warrant the plenary consideration of this Court.

The legal principle against this decision is sound and could be called "Presumption of legal title" and must be followed by any judicial system in order to maintain "order under law". Carried into other fields, the "presumption of innocence" would be abrogated; the "presumption of sanity" would be abrogated; the courts would be swamped with every citizen going into court to prove he was not a "criminal" and in another suit to prove that he was not "a dangerously insane person" the term "dangerously insane person" in the past was often termed "a witch".

Carrying this to a logical conclusion to demonstrate its unreasonable and untenable effect; every person who owns a parcel of land would have his title under suspicion unless he went into court every ten years and confirmed his title.

Respectfully submitted,

EDWARD I. JONES
Attorney for Appellants

APPENDIX I

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 40,588

December 9, 1957

GULFPORT FARM AND PASTURE COMPANY, A CORPORATION

vs.

HANCOCK BANK

GILLESPIE
Justice

A predecessor in title to appellant, who was complainant below, encumbered the subject lands with a deed of trust which was assigned to appellee, who was defendant below. The lands then passed to the ownership of appellant subject to the lien of the deed of trust held by appellee. The note secured by the deed of trust became past due and appellee executed and filed of record an instrument substituting L. M. Gex as trustee instead of Leo W. Seal, named in the deed of trust, although there was no authority for such substitution in the deed of trust. Gex, as substituted trustee, attempted to foreclose the deed of trust, and appellee became the purchaser at the sale. Gex, as such purported substituted trustee, executed a trustee's deed to appellee, dated July 6, 1931; after which time appellee took possession of the lands, caused the same to be assessed to appellee, and paid taxes thereon thereafter. Such possession, sufficient to meet the requirements of Section 718, Mississippi Code of 1942, as a mortgagee in possession after condition broken, con-

tinued for more than 24 years before this suit was brought by appellant to redeem said lands.

Appellee's answer included five affirmative defenses. The third affirmative defense was based on the statute of limitations as provided by Section 718, Mississippi Code of 1942, and the fourth affirmative defense was the ten-year statute of adverse possession. By consent of all parties, the cause was set for separate hearing on the third affirmative defense and upon such hearing the proof sustained appellee's contention, as already stated. The chancellor found that the third affirmative defense went to the entire cause of action and dismissed appellant's suit.

Appellant contends that the third affirmative defense based on the statute of limitation provided by Section 718 of the Code of 1942 was insufficient at law because the foreclosure sale under which appellee entered into possession was invalid (which is conceded); that Section 888, Mississippi Code of 1942, prescribes the method of sales under deeds of trust, and that section provides in the last sentence, "An error in the mode of sale such as makes the sale void will not be cured by any statute of limitations, except as to the ten-year statute of adverse possession." Appellant then proceeds to contend that Section 888 of the Code of 1942 is the applicable statute, and that appellee, who chose to limit the separate hearing to the defense based on Section 718 of the Code of 1942 was not entitled to rely on that statute of limitation, but that appellee was limited to the general statute of adverse possession, Section 711 of the Code of 1942.

The three statutes just referred to must be construed together in such manner, if possible, as to harmonize

and reconcile these statutes. 50 Am. Jur., Statutes, Section 363. We do not think it was intended by the last sentence of Section 888 to limit or restrict the right of a mortgagee in possession to rely on the provisions of Section 718. Appellee took possession after condition of the deed of trust was broken and remained in possession for the full statutory period provided in Section 718, which is a ten-year period. Appellee had a right to rely on either Section 718 or 711, or both. Appellee chose to plead both, but relied on only Section 718 in the separate hearing, which in some respects is more favorable to the adverse claimant than Section 711.

We hold appellee had a right to rely on Section 718 and that its defense established thereunder went to the entire case.

No other question justifying discussion is raised.

AFFIRMED.

ROBERDS, P. J., AND HALL, KYLE AND HOLMES, JJ., CONCUR.

APPENDIX II

MISSISSIPPI CODE OF 1942—1A RECOMPILED SECTION 718. MORTGAGES AND DEEDS OF TRUST.

When a mortgagee, after condition broken, shall obtain the actual possession or receipt of the profits or rent of land embraced in his mortgage, the mortgagor, or any person claiming through him, may not bring a suit to redeem the mortgage but within ten years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgement of the title of the mortgagor, or of his right of redemption, shall have been given in writing, signed by the mortgagee, or the person claiming through him; and in such case a suit may not be brought but within ten years next after the time at which such acknowledgement, or the last of such acknowledgements, if more than one, was given; but such acknowledgement shall be effectual only as against, and to the extent of the interest of the party signing it.

APPENDIX III

MISSISSIPPI CODE OF 1942—1A RECOMPILED SECTION 711. TEN YEARS' ADVERSE POSSESSION GIVE TITLE.

Ten years' actual adverse possession by any person claiming to be the owner for that time of any land, uninterruptedly continued for ten years by occupancy, descent, conveyance, or otherwise, in whatever way such occupancy may have commenced or continued, shall vest in every actual occupant or possessor of such land a full and complete title, saving to persons under the disability of minority or unsoundness of mind the right to sue within ten years after the removal of such disability, as provided in the first section of this chapter; but the saving in favor of persons under disability of unsoundness of mind shall never extend longer than thirty-one years.

APPENDIX IV

MISSISSIPPI CODE OF 1942—VOLUME 1A RECOMPILED

SECTION 888. HOW LANDS SOLD UNDER MORTGAGES AND DEED IN TRUST.

All lands comprising a single tract, and wholly described by the subdivisions of the governmental surveys, sold under mortgages and deeds of trust hereafter executed, shall be sold in the manner provided by section one hundred eleven of the constitution for the sale of lands in pursuance of a decree of court, or under execution. All lands sold at public outcry under deeds of trust hereafter executed, or other contracts hereafter made, shall be sold in the county in which the land is located, or in the county of the residence of the grantor, or one of the grantors in the trust deed, provided that where the land is situated in two or more counties, the parties may contract for a sale of the whole in any of the counties in which any part of the land lies. Sale of said lands shall be advertised for three consecutive weeks preceding such sale, in a newspaper published in the county, or, if none is so published, in some paper having a general circulation therein, and by posting one notice at the courthouse of the county where the land is situated, for said time, and such notice and advertisement shall disclose the name of the original mortgagor or mortgagors in said deed of trust or other contract. No sale of lands under a deed of trust or mortgage, shall be valid unless such sale shall have been advertised as herein provided for, regardless of any contract to the contrary. An error in the mode of sale such as makes the sale void will not be cured by any statute of limitations, except as to the ten-year statute of adverse possession.

APPENDIX V

MISSISSIPPI CODE OF 1942—VOLUME 2 RECOMPILED

SECTION 1324. REMOVING CLOUDS UPON TITLES.

When a person not the rightful owner of any real estate, shall have any conveyance or other evidence of title thereto, or shall assert any claim, or pretend to have any right of title thereto, which may cast doubt or suspicion on the title of the real owner, such real owner may file a bill in the chancery court to have such conveyance or other evidence or claim of title cancelled, and such cloud, doubt or suspicion removed from said title, whether such real owner be in possession or not, or be threatened to be disturbed in his possession or not, and whether the defendant be a resident of this state or not; and any person having the equitable title to land may, in like cases, file a bill to divest the legal title out of the person in whom the same may be vested, and to vest the same in the equitable owner. Any person holding or claiming under a tax title lands heretofore or hereinafter sold for taxes may proceed hereunder in like manner and may include, as a defendant, any political subdivision of the state having or asserting any evidence or claim of title adverse to such tax title.